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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 114

GENERAL AMERICAN INVESTORS COMPANY, INC.,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 4, 1954
CERTIORARI GRANTED OCTOBER 14, 1954

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

GENERAL AMERICAN INVESTORS COMPANY, INC., Petitioner, *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 36220.

Appearances:

For Petitioner:

JOHN F. DOOLING, JR. Esq.
NORRIS DARRELL, Esq.

For Respondent:

ARTHUR L. NIMS, Esq.

Docket Entries.

(T. R. 1)

1951

Aug. 16—Petition received and filed. Taxpayer notified. Fee paid.
" 16—Copy of petition served on General Counsel.
" 16—Request for Circuit hearing in New York filed by taxpayer. 8/27/51 Granted.
" 16—Motion to amend petition, embodying amendment, filed by taxpayer. Copy served.
Sept. 17—Answer filed by General Counsel.
" 19—Copy of answer served on taxpayer, New York.

Docket Entries.

1952

Feb. 13—Hearing set April 28, 1952, New York, New York.
Apr. 28—Hearing had before Judge Black, on merits. Appearance of Robert A. McDowell filed. Stipulation of facts filed. Briefs due July 1, 1952. Replies due July 20. 1952.
May 20—Transcript of hearing 4/28/52 filed.
June 30—Brief filed by taxpayer. Copy served 7/2/52.
July 1—Entry of appearance of Norris Darrell filed.
" 1—Brief filed by General Counsel.
" 21—Reply brief filed by taxpayer. Copy served.
" 21—Reply brief filed by General Counsel.
Dec. 30—Findings of fact and opinion rendered, Black, Judge. Decision will be entered for the respondent. Copy served.
" 31—Decision entered, Eugene Black, Judge, Div. 15.

1953

Mar. 26—Petition for review by U. S. Court of Appeals, Second Circuit, with assignments of error filed by petitioner.
" 26—Proof of service filed.
" 26—Praecipe for and designation of contents of record filed by petitioner.
" 26—Proof of service of designation of contents of record filed.
Apr. 6—Proof of service of petition for review, praecipe for and designation of contents of record filed by taxpayer.

Findings of Fact and Opinion.

(T. R. 19-23).

[Same Caption]

Docket No. 36220 Promulgated December 30, 1952

Respondent determined a deficiency of $57,922.55 for the calendar year 1948. By appropriate assignment of error petitioner contests the entire deficiency and alleges the following error:

> The Commissioner erroneously determined that the petitioner realized taxable income of $157,038.04 by its receipt in 1948 of $170,038.04 (in connection with the receipt of which it was entitled to an allowance of legal expenses of at least $13,000 which it did not deduct on its return) pursuant to Section 30(f) of the Investment Company Act of 1940 and Section 16(b) of the Securities Exchange Act of 1934.

Findings of Fact.

All the facts have been stipulated and are found accordingly.

Petitioner is a corporation organized under the laws of the State of Delaware, with its principal office at 44 Wall Street, New York 5, New York. Petitioner is a registered closed-end investment company as defined in the Investment Company Act of 1940.

A Federal income tax return for the calendar year 1948, prepared on an accrual basis, was filed by petitioner with the collector of internal revenue for the second district of New York.

On or about April 1, 1944, an individual who was one of petitioner's directors, hereinafter referred to as "Director," acquired warrants to purchase shares of the common stock of petitioner at five different prices ranging from $10

to $20 per share, the warrants covering an equal number of shares at each price. On the basis of his average cost of all the warrants then so acquired, the warrants to purchase 12,228 shares of petitioner's common stock which he exercised as stated hereafter had a cost basis to the Director of $4,800.

On or about April 1, 1944, a second individual, hereinafter referred to as "Stockholder" also acquired warrants of the type referred to above. On the basis of his average costs of all the warrants then so acquired, the warrants to purchase 27,027 of the 28,532 shares of petitioner's common stock which he exercised as stated hereafter had a cost basis to the Stockholder of $10,609.22. The Stockholder owned more than 10 per cent of the then outstanding warrants at all times between June 5, 1945 and June 17, 1946.

Between June 5, 1945 and June 17, 1946, the Director, individually and through a partnership of which he was a member, sold on the New York Stock Exchange an aggregate of more than 12,228 shares of petitioner's common stock in blocks of various sizes and for various amounts. Between June 5, 1945 and June 17, 1946, the Stockholder, individually and through a partnership of which he was a member, sold on the New York Stock Exchange 27,027 shares of petitioner's common stock in blocks of various sizes and for various amounts.

On December 4 and 18, 1945, the Director exercised warrants to purchase an aggregate of 12,228 shares of Petitioner's common stock at an average purchase price of $13.75 per share. On December 4 and 18, 1945, the Stockholder exercised warrants to purchase 28,532 shares of petitioner's common stock at an average purchase price of $13.75 per share. Of the proceeds received by the petitioner at the time of the exercise of the warrants by the said persons, $1.00 per share was credited to the petitioner's capital account and the balance thereof was credited to the petitioner's capital surplus account.

Findings of Fact and Opinion.

Pursuant to the provisions of section 30(f) of the Investment Company Act of 1940 and section 16(b) of the Securities Exchange Act of 1934, the above-described persons were required to pay in to the petitioner certain "profits" (as that term is used in the Securities Exchange Act of 1934) which they had realized upon the sale and purchase, or purchase and sale, of petitioner's common stock during the period June 5, 1945 to June 17, 1946, inclusive. The only purchases of petitioner's common stock by the above-described persons during said period were the purchases upon the exercise of the warrants described above. The determination of the "profits" so realized is tabulated as follows:

	Stockholder		Director	
	Shares	Amount	Shares	Amount
a. Proceeds of Sales..	27,027	$511,593.42	12,228	$254,027.33
b. Subscription to Common Stock....	27,027	371,621.25	12,228	168,135.00
c. Cost of Warrants....		10,609.22		4,800.00
d. Calculated "Profit" on sales required to be paid in to petitioner (line a minus the sum of lines b and c).....		$129,362.95		$ 81,092.33

Of the above set forth amount of $81,092.33 required to be paid by the Director, $40,417.24 was paid by him to the petitioner on March 9, 1946, and the remainder thereof, together with the entire amount required to be paid by the Stockholder, was paid to petitioner on January 26, 1948. These amounts received by petitioner were received without litigation and were paid by the said persons upon the advice of their counsel that they were liable to petitioner therefor.

The $40,417.24 received in 1946 from the Director was in that year credited to petitioner's capital surplus account. The amounts received from the said persons in 1948 as

aforesaid were recorded by petitioner in its cash book as "Capital Surplus—add'l amt recd in connection with common stock issued in 1945," and the aggregate amount so received in 1948 was credited to petitioner's capital surplus account. Thereafter, on March 31, 1948 (after receiving a letter-ruling from the Bureau of Internal Revenue dated February 26, 1948, to the general effect that the said amount received in 1948 should be returned as income), petitioner debited its capital surplus account for the said amount and credited a receipts-in-suspense account with an equal amount. At the close of the year 1948, the receipts-in-suspense account was debited with the amount of a reserve for taxes in respect of the amounts received in 1946 and 1948, and with the amount of legal expenses incurred up to December 31, 1948, in respect of the amounts recovered in that year, and the balance of $92,038.04 in said receipts-in-suspense account was simultaneously transferred to capital surplus.

Petitioner expended the sum of $13,000 as legal fees in connection with the recovery of the amounts due from the Director and the Stockholder, which fees respondent allowed as a credit against the gross amount received.

From the foregoing facts we find the following ultimate facts: The amounts which were paid to the petitioner by the Director and by the Stockholder under compulsion of section 16(b) of the Securities Exchange Act of 1934 and section 30(f) of the Investment Company Act of 1940 constituted gross income to the petitioner for the year 1948.

OPINION.

BLACK, *Judge:* The applicable statutes in this proceeding are section 22(a) of the Internal Revenue Code, section 30(f) of the Investment Company Act of 1940, 54 Stat. 837, 15 U. S. C. section 80a-29(f) and section 16(b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. section 78p(b). Section 22(a) of the Code is so familiar that it is unnecessary to incorporate it herein. The other

two applicable statutory provisions are printed in the margin.[1]

The only question presented is whether amounts which were paid to the petitioner in 1948 by certain persons under

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[1] Section 30(f) of the Investment Company Act of 1940, 54 Stat. 837, 15 U. S. C. section 80a-29(f):

> (f) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of outstanding securities (other than short-term paper) of which a registered closed-end company is the issuer or who is an officer, director, member of an advisory board, investment adviser, or affiliated person of an investment adviser of such a company shall in respect of his transactions in any securities of such company (other than short-term paper) be subject to the same duties and liabilities as those imposed by section 16 of the Securities Exchange Act of 1934 upon certain beneficial owners, directors, and officers in respect of their transactions in certain equity securities.

Section 16(b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. section 78p(b):

> (b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

compulsion of section 16(b) of the Securities Exchange Act of 1934 and section 30(f) of the Investment Company Act of 1940, both printed in the margin, constitute income to the petitioner. The statutes in question were designed to curb the abuses of short-term speculations in securities based on inside information or power to manipulate corporate policy. See Sen. Rep. No. 792 at pp. 7-9, 73d Cong., 2d Sess. (1934). *William F. Davis, Jr.*, 17 T. C. 549. Section 16(b), *supra*, provides that any profits realized by corporate insiders from "any purchase and sale, or any sale and purchase, of any equity security • • • [of their own corporation] within any period of less than six months, • • • shall inure to and be recoverable by" the corporation.

The instant case presents the same issue as was involved in *Park & Tilford Distillers Corp.* v. *United States*, (Ct. Cl.) ..... F. Supp. ....., decided November 4, 1952. The Court of Claims held that the "insider profits" were taxable income to the recipient corporation under the broad provisions of section 22(a), I. R. C., as "gains or profits and income derived from any source whatever." The fact that the income represented nondeductible penalty payments to the payors was not deemed to militate against their taxability.

Petitioner in its brief argues that:

> "• • • the relevant fact is that a section 16(b) recovery does not compensate the issuer for any impairment of capital or loss of profits; it does not result from any activity on the part of the issuer, but if not received by it as part of the subscription price for its stock, is a pure windfall, gratuitously received."

Petitioner argues further in its brief, as follows:

> "• • • In the present instance, however, as the respondent concedes, the Section 16(b) recovery was not a restitution to make the issuer whole for a loss of corporate profits, or even of corporate capital; it

was a pure windfall, measured by an objective measure of proof having no relationship to the actual profit of the fiduciary or to any loss by the corporation. It did not result from any action on the part of the corporation nor was it derived from corporate capital or the labor of corporate employees. If it were true that a Section 16(b) recovery amounts in effect to a payment 'into the corporate treasury of profits which may • • • have been realized at the expense of the outside stockholders,' it would nevertheless be a windfall or gratuitous contribution from the standpoint of the corporation."

It seems to us that the Court of Claims in the *Park & Tilford* case, *supra,* took into consideration much the same arguments as petitioner here uses and rejected them and held against the taxpayer there involved. We agree with the conclusion reached by the Court of Claims that the payments thus received were taxable income and decide the issue here involved against petitioner. The Court of Claims discussed the issue involved in a comprehensive manner and we feel it unnecessary to here repeat at any great length what the court there said.

We think it is appropriate, however, that we should say that our decisions in *Edward H. Clark,* 40 B. T. A. 333 and *Highland Farms Corporation,* 42 B. T. A. 1314 to which the Court of Claims referred in the concluding paragraph of its opinion are clearly distinguishable on their facts from the instant case. The *Clark* case was a case where in the taxable year the petitioner received a sum of money from his tax counsel as recompense for an error made by the latter in preparing and filing petitioner's 1932 return, the error having caused petitioner to pay more tax than he would have owed had the correct method been employed. Under such circumstances, we held that the compensatory payment was not includible in the taxpayer's gross income. In the *Highland Farm Corporation* case we held that dam-

ages against a bank mortgage awarded to a corporation for injuries resulting from a course of conduct pursued by the bank's president against the corporation was a restoration of lost capital and not taxable income. We also held in that case that punitive damages recovered by the taxpayer were not taxable income to it. We do not think that either of these cases are in conflict with our decision here.

Petitioner urges in its brief that our recent decision in *Glenshaw Glass Co.*, 18 T. C. ....., promulgated August 13, 1952, is apposite here. In that case we said:

> "The first issue is whether the sums received in settlement of the punitive damages claims constitute taxable income. It has long been established that punitive damages do not meet the test of taxable income set forth in *Eisner* v. *Macomber*, 252 U. S. 189, 193, as '"• • • the gain derived from capital, from labor, or from both combined", provided it be understood to include profit gained through a sale or conversion of capital assets • • •.' *Central R. Co.* v. *Commissioner*, 79 F. 2d 697; *Highland Farms Corporation*, 42 B. T. A. 1314. This basic definition has been recently cited with complete approval in *Commissioner* v. *Culbertson*, 337 U. S. 733, 740, and has been adhered to by the respondent in his Regulations 111, section 29.22(a)-1. Therefore, on the authority of those cases, we follow this rule of long standing that has never been questioned in any court and hold that the sums received in settlement of the punitive damages claims do not constitute taxable income."

The $170,038.04 here involved was not received by petitioner in payment of punitive damages. We do not think *Glenshaw Glass Co., supra,* which dealt with punitive damages paid to the taxpayer corporation is controlling here.

Petitioner here raises two alternative arguments that were not discussed in the *Park & Tilford* case, *supra.* Peti-

tioner characterizes the amounts in question as a capital contribution, citing *Edwards* v. *Cuba R. R. Co.*, 268 U. S. 628 and *Brown Shoe Co.* v. *Commissioner*, 339 U. S. 583. However, since the corporation had unrestricted discretion to use the funds for any purpose whatsoever, *Texas & Pacific Railway Co.* v. *United States*, 286 U. S. 285, and received a windfall benefit by operation of a Federal statute, there is no capital contribution.

Petitioner also contends that the amounts paid in constituted additional payments on the original issuance price of the stock, citing no authority. We do not think that the facts which have been stipulated sustain petitioner in that contention.

It seems to us under the facts which have been stipulated, we must hold that the amounts here involved were not payments of part of the purchase price of petitioner's stock acquired by its Director and its Stockholder and cannot be so treated. We hold, therefore, that the sums in question are income to petitioner under section 22(a), I. R. C.

Reviewed by the Court.

Decision will be entered for the respondent.

TIETJENS, *J.*, concurs in the result.

ARUNDELL, *J.*, dissents.

MURDOCK, *J.*, concurring: Section 16(b) of the Securities Exchange Act of 1934 provided that "any profit realized" under circumstances like those here present "shall inure to and be recoverable by the issuer," that is, the corporation. Thus the profits here in question were income of the petitioner within the words and intention of section 22(a) since they were "profits" either from "sales or deal-

ings in property • • • growing out of the ownership of • • • or interest in such property" or "from any source whatsoever."

VAN FOSSAN and TURNER, *JJ.*, agree with this concurring opinion.

Decision.

(T. R. 30)

[SAME CAPTION]

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated December 30, 1952, it is

ORDERED AND DECIDED: that for the calendar year 1948 there is a deficiency in income tax in the amount of $57,922.55.

Entered Dec 31 1952

Enter:

EUGENE BLACK,
Judge.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29—October Term, 1953.

(Argued February 9, 1954 Decided March 9, 1954.)

Docket No. 22718

GENERAL AMERICAN INVESTORS COMPANY, INC.,
Petitioner,

— v. —

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before:

CHASE, *Chief Judge,*

A. N. HAND and MEDINA, *Circuit Judges.*

On petition for review from a decision of the Tax Court of the United States, reported in 19 T. C. 531. AFFIRMED.

NORRIS DARRELL, JOHN F. DOOLING, JR. and ROBERT A. MCDOWELL, *Attorneys for Petitioner,* Sullivan & Cromwell, of Counsel.

H. BRIAN HOLLAND, Assistant Attorney General, Ellis N. Slack and Morton K. Rothschild, Special Assistants to the Attorney General, *for Respondent.*

EDINA, *Circuit Judge:*

The appeal in this case involves a deficiency in income ax for the calendar year 1948 in the amount of $57,922.55. n compliance with Section 30(f) of the Investment Com- any Act of 1940 and Section 16(b) of the Securities Ex- hange Act of 1934, a director, and a stockholder owning ore than 10% of the outstanding warrants for the pur- hase of petitioner's stock, who had realized profits in the espective sums of $81,092.33 and $129,362.95, paid these ums into the treasury of petitioner, as they were so-called short-swing profits" realized by an "insider" within the eaning of said Section 16(b), as construed and applied in *molowe* v. *Delendo Corp.*, 136 F. 2d 231 (2nd Cir., 1943). ertiorari denied, 320 U.S. 751.

Under similar circumstances moneys thus received by a orporation were held by the Court of Claims to be "gains r profits and income derived from any source whatever," ithin the meaning of Section 22(a) of the Internal Reve- ue Code. *Park & Tilford Distillers Corp.* v. *United States,* 07 F. Supp. 941, certiorari denied, 345 U. S. 917.

Petitioner relies principally upon the following definition f income contained in the opinion of the Supreme Court n the stock dividend case of *Eisner* v. *Macomber,* 252 U. S. 89, 207 (1920):

> " 'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets. * * * "

If this definition is to be regarded as all inclusive, and o be applied literally, it does not reach the payments to etitioner with which we are now concerned. And the range f discussion in the briefs and oral arguments before us has overed many situations said to be analogous, including tort

recoveries of punitive or exemplary damages in defamation cases, two-thirds of the triple damage awards in private antitrust suits, so-called "penalties" imposed upon faithless fiduciaries and others.[1]

Is there some common principle or touchstone by the application of which one may infallibly determine what is and what is not in a given case "gains or profits and income derived from any source whatever"? We think not. The old definition of *Eisner* v. *Macomber* was perhaps contrived in the hope that a final and definitive solution had been found. But by reason of the very nature of the subject matter this was not to be. The decision in *Eisner* v. *Macomber* still stands, but the definition has met the common fate of generalities, and it has long since given way to an empirical case by case approach, which has the virtue of elasticity and makes possible a more sensible solution of new problems as they arise.[2]

Policy considerations may in the end play a decisive or persuasive role in the punitive damage, antitrust and faithless fiduciary cases. For, despite the fact that the moneys received in those instances are at the free disposal of those to whom they are paid, and the rationale of such tribunals as have held them not to be "income" is based principally upon the *Eisner v. Macomber* definition, it may be thought by some that the public interest will be better served if such

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[1] See *Highland Farms Corp.*, 42 B. T. A. 1314 (1940); *Glenshaw Glass Co.*, 18 T. C. 860 (1952); *William Goldman Theatres, Inc.*, 19 T. C. No. 79 (1953); and *Central R. Co. of New Jersey* v. *Commissioner*, 79 F. 2d 697 (3rd Cir., 1935), where property in possession of a trustee *ex maleficio* was turned over to a corporation and held not to constitute "income," as "It was a penalty imposed by law on a faithless fiduciary, a gain granted gratuitously because of the necessity of keeping persons in positions of trust beyond the temptation of double dealing."

[2] Cf. Surrey & Warren, "A. L. I. Income Tax Project," 66 Harvard Law Rev. 761, 771 (1953). See also, *Rutkin* v. *United States*, 343 U. S. 130, rehearing denied 343 U. S. 952 (1952).

receipts are held not to be subject to the income tax. It is on some such basis that a taxpayer, who included "short-swing" profits in his gross income, has been denied deductions for payments of these same profits over to the corporations of which he was a director, officer or stockholder, as required by Section 16(b) of the Securities Exchange Act of 1934.[3] However imponderable or remote or difficult of ascertainment such policy questions may be we express no opinion thereon. Perhaps they have no relevance to the problem, and the Court of Claims was right when it expressed the view that *Central R. Co. of New Jersey* v. *Commissioner* and *Highland Farms Corp.* (see footnote 1, *supra*) were wrongly decided. *Park & Tilford Distillers Corp.* v. *United States, supra,* at p. 945. In any event, no considerations of policy would seem to affect this case one way or the other, since the beneficent purpose of Section 16(b) will be served equally well whether or not these payments are held to be "income" to petitioner.

It is at least clear that the answer is not to be found in mere terminology. Thus it will not help to characterize these payments as a "windfall" to the corporation or as in the nature of a "penalty" imposed upon the director and the stockholder.

In *United States* v. *Kirby Lumber Co.*, 284 U. S. 1 (1931), a corporation retired some of its own bonds after purchasing them at a price less than the face value, which it had received for them when issued, and it was held that the excess of the issuing price over the purchase price constituted "gains or profits and income from any source whatever," despite the fact that the *Eisner* v. *Macomber* definition could hardly be said to cover the case. Justice Holmes, writing for a unanimous court in that case, over ten years after *Eisner* v. *Macomber,* used these words (p. 3):

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[3] William F. Davis, Jr., 17 T. C. 549 (1951).

> "We see nothing to be gained by the discussion of judicial definitions. The defendant in error has realized within the year an accession to income, if we take words in their plain popular meaning, as they should be taken here."

So now, if we consider the words "gains or profits and income from any source," "in their plain popular meaning," as we think they should be, how can there be any doubt that these Section 16(b) payments are "income"?

Petitioner had unrestricted discretion to use the funds for any purpose whatsoever; they were in no sense donations or contributions to capital, or payments by way of restoration of lost capital, or compensation for any loss suffered by petitioner. Doubtless the subject in general is technical and often recourse is properly had to complicated and abstruse accounting practices; but here the issue is simplicity itself. Accordingly, we hold the sums thus received to be "income" to petitioner within the meaning of Section 22(a).

Perhaps reluctant to take a position seemingly inconsistent with prior decisions of the Tax Court, which relied heavily upon the *Eisner* v. *Macomber* definition and upon *Central R. Co. of New Jersey* v. *Commissioner*, 79 F. 2d 697 (3rd Cir., 1935), *supra*, the concurring judges below took the view that these payments were "profits," because Section 16(b) provided that "any profit realized" under the circumstances here present "shall enure to and be recoverable by the issuer." But this reasoning will not bear analysis. These payments were not "profits" to petitioner, although they represented "profits" realized by the director and the stockholder.

Petitioner's further contention that these payments were "part of the subscription price received upon issue of the stock in question" flies in the face of the realities of the

stock purchase transactions, which were complete when the stock was purchased through the exercise of the warrants. No bookkeeping entries made after the receipt by petitioner of these Section 16(b) payments could alter these basic facts. It is immaterial that the stock was not purchased on the open market.

Affirmed.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court house in the City of New York, on the 9th day of March one thousand nine hundred and fifty-four.

Present: Hon. Harrie B. Chase, Chief Judge; Hon. Augustus N. Hand, Hon. Harold R. Medina, Circuit Judges.

GENERAL AMERICAN INVESTORS CO., INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[Endorsed:] United States Court of Appeals, Second Circuit. General American Investors Co., v. Commissioner of Internal Revenue. (29). Judgment. United States Court of Appeals, Second Circuit. Filed Mar. 9, 1954. A. Daniel Musaro, Clerk.

Clerk's printing.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 23] THE TAX COURT OF THE UNITED STATES

Docket No. 36220

GENERAL AMERICAN INVESTORS COMPANY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true for the purposes of this proceeding, without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true, and subject to the right of either party to object to the relevancy or materiality of any of the stipulated facts.

1. Petitioner is a corporation organized under the laws of the State of Delaware, with its principal office at 44 Wall Street, New York 5, N. Y. Petitioner is a registered closed-end investment company as defined in the Investment Company Act of 1940.

2. A Federal income tax return for the calendar year 1948, prepared on an accrual basis, was filed by petitioner with the Collector of Internal Revenue for the Second District of New York.

[fol. 24] 3. On or about April 1, 1944, an individual who was one of petitioner's directors, hereinafter referred to as "Director," acquired warrants to purchase shares of the common stock of petitioner at five different prices ranging from $10 to $20 per share, the warrants covering an equal number of shares at each price. On the basis of his average cost of all the warrants then so acquired, the warrants to purchase 12,228 shares of petitioner's common stock which he exercised as stated below had a cost basis to the Director of $4,800.

4. On or about April 1, 1944, a second individual, hereinafter referred to as "Stockholder," also acquired warrants of the type referred to in Paragraph 3. On the basis of his average costs of all the warrants then so acquired, the

warrants to purchase 27,027 of the 28,532 shares of petitioner's common stock which he exercised as stated below had a cost basis to the Stockholder of $10,609.22. The Stockholder owned more than 10 per cent of the then outstanding warrants at all times between June 5, 1945 and June 17, 1946.

5. Between June 5, 1945, and June 17, 1946, the Director, individually, and through a partnership of which he was a member, sold on the New York Stock Exchange an aggregate of more than 12,228 shares of petitioner's common stock in blocks of various sizes and for various amounts.

Between June 5, 1945, and June 17, 1946, the Stockholder, individually and through a partnership of which he was [fol. 25] a member, sold on the New York Stock Exchange 27,027 shares of petitioner's common stock in blocks of various sizes and for various amounts.

6. On December 4 and 18, 1945 the Director exercised warrants to purchase an aggregate of 12,228 shares of petitioner's common stock at an average purchase price of $13.75 per share.

On December 4 and 18, 1945 the Stockholder exercised warrants to purchase 28,532 shares of petitioner's common stock at an average purchase price of $13.75 per share.

7. Of the proceeds received by the petitioner at the time of the exercise of the warrants by the said persons, $1 per share was credited to the petitioner's capital account and the balance thereof was credited to the petitioner's capital surplus account.

8. Pursuant to the provisions of Section 30(f) of the Investment Company Act of 1940, 54 Stat. 836, (1940), 15 U.S.C. Section 80(a)-29, and Section 16(b) of the Securities Exchange Act of 1934, 48 Stat. 896 (1934), 15 U.S.C. Section 78(p), the above-described persons were required to pay in to the petitioner certain "profits" (as that term is used in the Securities Exchange Act of 1934) which they had realized upon the sale and purchase, or purchase and sale, of petitioner's common stock during the period June 5, 1945, to June 17, 1946, inclusive. The only purchases of petitioner's common stock by the above-described persons during said period were the purchases upon the exercise of the warrants described in paragraph 6 above.

[fol. 26] The determination of the "profits" so realized is tabulated as follows:

	Stockholder		Director	
	Shares	Amount	Shares	Amount
a. Proceeds of Sales	27,027	$511,593.42	12,228	$254,027.33
b. Subscription to Common Stock	27,027	371,621.25	12,228	168,135.00
c. Cost of Warrants	.....	10,609.22	.....	4,800.00
d. Calculated "Profit" on sales required to be paid in to petitioner (line a minus the sum of lines b and c)	.....	$129,362.95	.....	$ 81,092.33

Of the above set forth amount of $81,092.33 required to be paid by the Director, $40,417.24 was paid by him to the petitioner on March 9, 1946, and the remainder thereof, together with the entire amount required to be paid by the Stockholder, was paid to petitioner on January 26, 1948.

9. The said amounts received by petitioner as aforesaid were received without litigation and were paid by the said persons upon the advice of their counsel that they were liable to petitioner therefor.

10. The $40,417.24 received in 1946 from the Director was in that year credited to petitioner's capital surplus account. The amounts received from the said persons in 1948 as aforesaid were recorded by petitioner in its cash book as "Capital Surplus—add'l amt recd in connection with common stock issued in 1945," and the aggregate [fol. 27] amount so received in 1948 was credited to petitioner's capital surplus account. Thereafter, on March 31, 1948 (after receiving a letter-ruling from the Bureau of Internal Revenue dated February 26, 1948, to the general effect that the said amount received in 1948 should be returned as income), petitioner debited its capital surplus account for the said amount and credited a Receipts-in-Suspense Account with an equal amount. At the close of the year 1948 the Receipts-in-Suspense Account was debited with the amount of a reserve for taxes in respect of the amounts received in 1946 and 1948, and with the amount of legal expenses incurred up to December 31, 1948, in respect of the amounts recovered in that year, and the

balance of $92,038.04 in said Receipts-in-Suspense Account was simultaneously transferred to capital surplus.

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Acting Chief Counsel,
Bureau of Internal Revenue.

[fol. 28] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1954

No. 114

GENERAL AMERICAN INVESTORS COMPANY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.